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83-1702
No.

In the Supreme Court of the United States

October Term, 1983

CHARLESTON TOWN CENTER PARKING, *et al.*,
Petitioners,

vs.

TRI-STATE STEEL ERECTORS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the West Virginia
Supreme Court of Appeals

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QUESTION PRESENTED

If a contract contains an arbitration agreement that would be enforceable in a federal district court under the Federal Arbitration Act, then is a state court likewise required to apply the Act and the related body of federal substantive law and enforce the agreement?

PARTIES AND RULE 28.1 STATEMENT

This petition is filed on behalf of Charleston Town Center Parking ("Town Center"), and Forest City Dillon, Inc. ("Forest City"). Forest City is a wholly owned subsidiary of Forest City Enterprises, Inc. Respondent is Tri-State Steel Erectors, Inc. ("Tri-State").

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PETITION FOR WRIT OF CERTIORARI
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Town Center and Forest City (collectively referred to as "Petitioners") respectfully petition for certiorari to review the judgment of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals, entered on January 17, 1984, is unreported and is reprinted at A1 of the Appendix to this petition. The opinion of the Circuit Court of Kanawha County, West Virginia, entered on November 3, 1983, is also unreported and is reprinted at A2 of the Appendix.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on January 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

This action involves Sections 2 and 3 of the Federal Arbitration Act, 9 U.S.C. §§2-3 (the "Federal Act"), which provide as follows:

> Section 2. VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF AGREEMENTS TO ARBITRATE - A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> Section 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION - If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration

has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

This petition concerns the refusal of the West Virginia courts to enforce an arbitration provision in two construction contracts between Town Center and Tri-State. Town Center is a West Virginia limited partnership and is the owner of Charleston Town Center, a regional shopping and business complex in downtown Charleston, West Virginia. Forest City is an Ohio corporation and served Town Center as construction manager for Charleston Town Center. Tri-State is a West Virginia corporation that entered into two contracts with Town Center for the construction and erection of parking garages located within the downtown Charleston complex.

Each of the contracts between Town Center and Tri-State contained an agreement to arbitrate all controversies between the parties. The language in each of the contracts was identical:

> 26. DISPUTES
>
> If at any time controversy shall arise between the Contractor [Town Center] and the Subcontractor [Tri-State] with respect to any matter or thing involved in this Subcontract, and which the parties hereto do not promptly adjust and determine or which the Contractor or his authorized representative cannot decide to the satisfaction of both parties hereto, then the written orders of the Contractor shall be followed and upon completion of the work and before the final set-

tlement and payment is made, said controversy shall be decided by arbitration in Cleveland, Ohio in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing, unless both parties mutually agree otherwise. This agreement shall be enforceable, and the award rendered by the Arbitrators shall be final, and judgment may be entered thereon.

Tri-State's performance of its contracts was not satisfactory to Town Center and Forest City, and the Petitioners elected to exercise the rights expressed in the contracts to terminate Tri-State's work. Tri-State then filed a complaint against Town Center and Forest City in the Circuit Court of Kanawha County, West Virginia, claiming that the contracts were wrongfully terminated.

In response to the complaint, Town Center and Forest City filed alternative motions to dismiss the complaint or to stay further proceedings before the Circuit Court of Kanawha County, pending the outcome of the arbitration required by the contract. Petitioners expressly asserted that application of the Federal Act to the arbitration agreement required that the arbitration provision be enforced and that further trial court proceedings be stayed (Petitioners' Memorandum of Law, etc., filed March 29, 1983).

On November 3, 1983, an order was entered denying Petitioners' motion. In so doing, the trial court applied the substantive law of West Virginia rather than the Federal Act and federal substantive law. The order entered by the trial court not only omits any reference to the Federal Act which Petitioners had relied upon, but also expressly applied state law as set forth in *Board of Education v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (W. Va. 1977).

On January 12, 1984, Town Center and Forest City filed a Petition for a Writ of Prohibition with the West Virginia Supreme Court of Appeals, naming as respondents both Tri-State and the Honorable Robert M. Harvey, Judge of the Circuit Court of Kanawha County, West Virginia. The petition prayed that Judge Harvey be compelled to order specific performance of the arbitration agreement and to stay further action. Petitioners again expressly asserted that the Federal Act required the court to enforce the arbitration agreement and to stay further proceedings (Petitioners' Memorandum of Law In Support of Petition, filed January 12, 1984).

The West Virginia Supreme Court of Appeals granted a rule to show cause, reviewed the petition on the merits and on January 17, 1984, denied without explanation, the petition of Town Center and Forest City for relief under the Federal Act.

REASONS FOR GRANTING THE WRIT

The refusal of the West Virginia Supreme Court of Appeals to grant the Petitioners' Writ of Prohibition either conflicts with this Court's earlier decisions that the Federal Act applies to contracts evidencing interstate commerce or raises an important question of federal law concerning the obligation of state courts to enforce the Federal Act where applicable. In either case, this Court should grant review.

The Federal Act creates a clear presumption in favor of arbitration. In *Southland Corp. v. Richard Keating,* 52 U.S.L.W. 4131 (1984), this Court recently reaffirmed its view that the Federal Act creates a body of federal substantive law applicable equally in state and federal courts. This Court again emphasized the existence of a federal

policy favoring arbitration, a policy which was also articulated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927 (1983). In the latter opinion, this Court described the approach that lower courts must use in construing arbitration agreements:

> . . . [D]oubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 941-2. The *Moses H. Cone* opinion cited with approval *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166 (5th Cir. 1979), which stated the test of determining arbitrability to be as follows:

> . . . [U]nless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.

605 F.2d at 168.

Petitioners sought to have the Federal Act and federal substantive law applied to their dispute with Tri-State. Interstate commerce, the only predicate to the application of the Federal Act, was clearly evident in the contractual relationship between Town Center and Tri-State.

Given these circumstances, the decision of the West Virginia Supreme Court of Appeals is clearly and grievously erroneous. That court either applied the federal standard improperly or, deferring to state law, failed to apply the federal standard at all.

The West Virginia Supreme Court of Appeals, in its judgment entry, wholly fails to discuss Petitioners' re-

liance on the Federal Act. Moreover, the order issued by the Circuit Court of Kanawha County reveals the trial court's improper reliance upon state law. According to the order, the court evaluated the Petitioners' agreement to arbitrate by the standards espoused in *Board of Education v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (W. Va. 1977), a case that did not involve the Federal Act. Such state law precedent is wholly irrelevant to the construction of an arbitration agreement under the Federal Act. *See Hart v. Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971).

Furthermore, the record below is devoid of evidence or even argument that would support the finding required under the Federal Act that the arbitration agreement here is not susceptible to an interpretation upholding arbitrability. *See Wick*, 605 F.2d at 168. Indeed, just to the contrary, a reading of the arbitration clause in the context of the entire agreement shows that the parties contemplated the possibility of the termination of Tri-State's performance, and therefore the arbitration clause requiring resolution of all controversies by arbitration covers termination as well.

This Court should grant this petition because the actions of the West Virginia courts either raise an important federal issue about the obligation of state courts to apply the Federal Act and federal substantive law, or those actions conflict with this Court's opinion in *Southland*. In that case, the Court held that the California Franchise Investment Law violated the Supremacy Clause, because it undercut the enforceability of arbitration agreements under the Federal Act. Applying the *Southland* opinion literally, this Court has precluded only state *legislative* action from interfering with the operation of the Federal Act. An important federal question still re-

mains to be decided, *i.e.* whether state courts must apply the Federal Act and federal substantive law, as opposed to state contract law, in deciding whether arbitration agreements are enforceable.

In her dissent in *Southland,* Justice O'Connor has read the majority opinion to hold that state courts are now already obligated to apply the Federal Act and related federal substantive law. If Justice O'Connor's view of the *Southland* opinion is correct, then the West Virginia courts, in denying Petitioners' motion to stay this case pending arbitration, are in direct conflict with this Court's opinions in *Southland* and *Moses H. Cone,* both of which would require arbitration of this dispute.

In either event, the decisions of the West Virginia courts have thus far frustrated the clear intent of Congress in enacting the Federal Act, "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone,* 103 S. Ct. at 940. If this Court does not grant review of the decision below, the petitioners will be subjected to "prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland,* 52 U.S.L.W. at 4133.

CONCLUSION

For these reasons, and in accordance with the foregoing authorities, a writ of certiorari should issue to review the judgment of the West Virginia Supreme Court of Appeals.

Respectfully submitted,

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APPENDIX

OPINION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

(Dated January 17, 1984)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of January, 1984, the following order was made and entered, to-wit:

Charleston Town Center Parking, etc., *et al.*

vs.

The Honorable Robert M. Harvey, Judge, etc., *et al.*

Prohibition

On a former day, to-wit, January 12, 1984, came the petitioners, Charleston Town Center Parking, Limited Partnership, and Forest City Dillon, Inc., a Corporation, by Lovett & Cooper and James T. Cooper, their attorneys, and presented to the Court their petition and exhibits, praying for a writ of prohibition to be directed against The Honorable Robert M. Harvey, Judge of the Circuit Court of Kanawha County, West Virginia, and Tri-State Steel Erectors, Inc., a West Virginia Corporation, as therein set forth. Upon consideration whereof the Court is of opinion that a rule should not be awarded and the prayer of the petition is therefore denied.

Attest: /s/ (Illegible)
Clerk Supreme Court of Appeals

OPINION OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

(Entered November 3, 1983)

Civil Action No. 83-C-551

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRI-STATE STEEL ERECTORS, INC.,
a West Virginia corporation,
Plaintiff,

vs.

CHARLESTON TOWN CENTER PARKING, LIMITED PARTNERSHIP, and FOREST CITY DILLON, INC.,
its Managing General Partner,
Defendants.

ORDER DENYING DEFENDANTS' MOTION TO COMPEL SPECIFIC PERFORMANCE OF ARBITRATION CLAUSE AND TO STAY PROCEEDING

On August 5, 1983, came the defendants by their counsel, Lovett & Cooper, and the plaintiff by its counsel, Denny & Caldwell, pursuant to a hearing on the motion of defendants heretofore filed on February 22, 1983, said motion, among other things, being to compel specific performance of an arbitration clause in a construction agreement between plaintiff and defendants, dated August 26, 1982, said construction agreement being attached to plaintiff's complaint and labeled Exhibit A. The Court having reviewed the construction agreement and in particular, Paragraph 26 of the construction agreement, being the

paragraph dealing with arbitration, having reviewed the briefs of both plaintiff and defendants and having heard the arguments of counsel, after a careful and a mature consideration, does make the following findings:

1. Plaintiff has not completed all of the work described in the aforesaid construction agreement.

2. The arbitration clause as set forth in Paragraph 26 of the aforesaid construction agreement is by its own terms limited as to the scope of its coverage.

3. The arbitration clause as set forth in Paragraph 26 is not a broad clause encompassing all disputes such as the type of arbitration clause found in *Board of Education v. Miller*, ... W.Va. ....., 236 S.E.2d 439 (1977).

Because of the limited scope of the arbitration provision found in Paragraph 26 of the construction agreement, which said provision is not operative until completion of the contract by plaintiff, the Court is of the opinion to, and does hereby, deny defendants' motion to compel specific performance of the arbitration clause and to stay these proceedings.

Thereupon, defendants moved the Court to temporarily stay all proceedings in this action and to extend the time within which defendants must answer to permit defendants sufficient time to appeal this Court's ruling. Plaintiff responded it had no objection to defendants' motion provided discovery would proceed during the interim. Thereupon, the Court does ORDER that no further proceedings be taken in this action except discovery by written interrogatories, oral depositions and all other means provided by the Rules of Civil Procedure until December 15, 1983, at which time defendants shall answer plaintiff's complaint and this action shall go forward to a final determination.

Defendants do hereby object and except to the Court's denial of its motion to compel specific performance of arbitration and to stay these proceedings.

ENTERED this 3rd day of November, 1983.

/s/ ROBERT M. HARVEY
Judge

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